

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MITCHELL G. MENIK</b>	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NOS. 815716
Personal Income Taxes under Article 22 of the Tax Law	:	THROUGH 815722
and the New York City Administrative Code for the Period :	:	
January 1, 1992 through June 24, 1994.	:	

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Petitioner, Mitchell G. Menik, 385 Starke Avenue, East Meadow, New York 11554-2824, filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the period January 1, 1992 through June 24, 1994.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 12, 1997 at 10:30 AM. Both parties filed briefs. Petitioner's reply brief was filed on March 9, 1998 which date began the six-month period for issuance of a determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kevin Law, Esq., of counsel).

***ISSUE***

Whether petitioner is liable for penalties under Tax Law § 685(g) for the unpaid withholding taxes of CashTek Corporation.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to petitioner, Mitchell G. Menik, seven notices of deficiency, each dated March 17, 1995. The notices assert penalties against petitioner under the authority of Tax Law § 685(g) as follows:

January 1, 1992 through December 31, 1992	\$ 37,566.18
January 8, 1993 through March 26, 1993	6,133.74
April 2, 1993 through June 25, 1993	8,591.22
July 2, 1993 through September 24, 1993	12,799.73
October 1, 1993 through December 24, 1993	14,051.71
January 7, 1994 through March 25, 1994	15,244.31
April 1, 1994 through June 24, 1994	<u>14,164.73</u>
Total:	\$ 108,551.62

2. Each notice explains that petitioner, as an officer or responsible person, has been found liable for a penalty in an amount equal to taxes not paid by CashTek Corporation (“CashTek”).

3. Notice number L-010143101-7, for the period ending December 31, 1992, states that payments of \$31,282.15 have been applied to the total penalty amount reducing the balance due for that period to \$6,284.03.<sup>1</sup>

4. Following a conference in the Bureau of Conciliation and Mediation Services, a Conciliation Order, dated December 20, 1996, was issued by the Division sustaining the statutory notices of deficiency.

5. CashTek is a Delaware corporation doing business in New York. It was formed on February 8, 1991 to acquire the systems and technology of Kenilworth Systems Corporation

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<sup>1</sup>The payment of \$31,282.15 relates to payments made by CashTek for withholding tax for the period January 1, 1992 through December 31, 1992. Since CashTek’s payments reduced the tax due, the penalty against petitioner was reduced in an amount equal to the tax paid. No other tax payments were made by or on behalf of CashTek after the notices of deficiency were issued to petitioner.

(“Kenilworth”) which was in a chapter 7 bankruptcy proceeding at the time. Kenilworth was in the business of developing a system of gaming terminals and computer software which would permit the use of cards in lieu of cash in gambling casinos. It owned certain proprietary information, patents and copyrights, and it was in the process of seeking out investors and marketing and developing its technology.

6. In June 1988, petitioner was hired as Kenilworth’s vice president in charge of marketing, public relations and investor relations. Kenilworth’s president was Herbert Lindo, founder of the corporation. His son, Jeffrey Lindo, was its executive vice-president. Petitioner’s primary responsibilities were responding to shareholder inquiries and assisting with marketing of CashTek’s cashless wagering system. Petitioner’s past experience includes teaching and management in casinos and gaming schools in New York and Las Vegas.

7. In February 1991, petitioner was appointed to the position of secretary of CashTek. When he was asked to accept this position, he was told that the corporation needed someone to take minutes at meetings. He also executed corporate documents that required the signature of the secretary. From its formation in 1991 until April 1993, CashTek’s president, board chairman and treasurer was Herbert Lindo, with his son Jeffrey holding the office of executive vice-president.

8. Petitioner is listed as an officer on CashTek’s Federal income tax returns for the calendar years 1991, 1992 and 1993. This includes the period covered by the Division’s assessment. The returns show that petitioner drew a salary of \$50,962.00 in the 1991 tax year, of \$54,904.00 in the 1992 tax year and of \$67,019.00 in the 1993 tax year. In addition, petitioner was provided with a company car. The corporate tax returns do not show salaries paid to Harold Lindo or Jeffrey Lindo.

9. Petitioner is shown as an authorized signatory on a Bank of New York checking account opened on September 17, 1992, account number 500-1-073229. His title on the bank signature card is shown as vice-president. He also signed the card as secretary of CashTek. This is the earliest evidence of petitioner's name appearing on a bank signature card as an officer of CashTek. Harold Lindo and Jeffrey Lindo are also signatories on the account. Only one of the three authorized signatures was required on a corporate check. Petitioner states that he was added as a signatory to the account as a convenience to the Lindos.

10. Upon its formation, CashTek engaged a firm of investment bankers, Josephthal, Lyon and Ross, to obtain financing for the company. A private placement of securities brought in approximately \$6.8 million of start-up capital. Most of these funds were contributed by a group of foreign investors who were represented by Edward Lee, a venture capitalist. Approximately \$3.8 million of these funds was used to purchase the assets of Kenilworth.

11. In March 1993, Herbert Lindo was convicted in Federal court of three violations of the Securities Act of 1933. He resigned his positions at CashTek, and Jeffrey Lindo became president and treasurer. Petitioner believed that Jeffrey Lindo continued to allow his father to control cash and write checks on the CashTek bank accounts after his father's resignation from the corporation, and he was dissatisfied with this arrangement.

12. On July 13, 1993, petitioner resigned from his positions as secretary and vice-president of CashTek. He was acting in these positions without any authority or control over corporate affairs, and, when he asked, he was denied information about the financial affairs of CashTek. In a letter to Jeffrey Lindo, he states: "My current title does not accurately reflect my duties. As per our discussion please accept my resignation as Secretary and Vice President of

Marketing and Public Relations.” Apparently, petitioner continued to be a signatory on the Bank of New York account.

13. On August 31, 1993, CashTek’s Board of Directors asked petitioner to accept the position of temporary treasurer. The primary purpose for this was to have petitioner act as a safeguard by requiring his signature on all checks. In actuality, petitioner was unable to prevent Jeffrey Lindo from giving his father access to CashTek’s corporate accounts.

14. In a letter to the Securities and Exchange Commission dated September 23, 1994, CashTek’s representative, Andrew B. Weissman (a Washington D.C. attorney), explained the circumstances surrounding the firing of Harold Lindo and his son, Jeffrey Lindo. The following facts are taken primarily from that letter. In September 1993, three new directors, including Edward Lee, joined the CashTek board. At their insistence, the accounting firm of Dalessio, Millner and Leben was engaged to audit CashTek’s books and records. The audit uncovered financial improprieties and shortcomings in the finances of CashTek, and these findings were reported to the board in December 1993. After investigating the problems, the board fired Jeffrey Lindo and had him physically removed from the offices of CashTek on January 4, 1994. The board named Edward Lee as president and chairman of the board.

15. On January 28, 1994, the CashTek board sued the Lindos in the Supreme Court of Nassau County seeking reimbursement of over \$3 million. In its complaint, CashTek alleged: “From on or about April 15, 1993, to and including January 4, 1994, defendant Jeffrey Lindo was Treasurer of CashTek.” This allegation conflicts with petitioner’s own admission that he was appointed as temporary treasurer on August 31, 1993. It is, however, consistent with his testimony that he had no real authority during the period in which Harold Lindo and Jeffrey Lindo were in control of CashTek.

16. An article in Newsday, dated February 4, 1994, reported the lawsuit brought by CashTek against Herbert and Jeffrey Lindo. In that article, petitioner is identified as a company vice president. Information in the article concerning Edward Lee's ascension to leadership of the company is attributed to petitioner. He is not quoted in the article or identified as a spokesperson for the company.

17. In their answer to CashTek's complaint, the Lindos served counterclaims against CashTek. In addition, the Lindos sued each of the directors of CashTek individually, and petitioner as secretary and treasurer of CashTek, alleging that the CashTek press release was issued with malice and ill will and damaged the business reputation of the Lindos.

18. After the ouster of the Lindos, Edward Lee became active in raising capital for CashTek and managing the corporation. In order to raise capital, Lee traveled widely, particularly in Asia. Petitioner was asked to be a signatory on all corporate checks and to perform certain administrative functions in Lee's absence. Petitioner held the titles of vice-president, secretary and treasurer of CashTek after Lee's appointment as president.

19. After January 1994, petitioner's name appears on a number of financial documents. He executed a "Financing Statement" on behalf of CashTek, dated February 22, 1994, as vice-president of CashTek. A bank signature card for Bank of New York account number 6900023705 was executed on or about March 24, 1994. The authorized signatures are Edward Lee, as president of CashTek, petitioner as vice-president, secretary and treasurer of CashTek; and Larry Shluger<sup>2</sup>. All three signatures were initially required on a check, but this was changed to two signatures as of July 24, 1994. The account was closed on March 14, 1995. Petitioner is

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<sup>2</sup>Larry Schluger was CashTek's Director of Personnel.

shown on a safe deposit box leasing card, dated January 28, 1994, as vice-president, secretary and treasurer of Cashtek, and Edward Lee is shown as president on the same document. One signature was required for access to the safe deposit box.

20. The Division introduced into evidence several other documents bearing petitioner's signature. Their import is uncertain. One such document is a bank signature card dated March 24, 1994 where petitioner's name appears, with those of Edward Lee and Larry Schluger, as an authorized signatory on the account with two signatures needed to act on behalf of the corporation. The name of the bank and account number to which this document relates is not certain; however, it is known that CashTek had two Bank of New York accounts, the one previously identified and account number 6900026519. Petitioner's name appears on a second banking document as a "Principal" and as vice-president, secretary and treasurer; however, the card is undated, unsigned, does not bear the name of CashTek or the bank or financial institution to which it relates or an account number.

21. In a letter to Edward Lee dated July 13, 1994, petitioner tendered his resignation as treasurer of CashTek. He states in that letter that he has never acted without the supervision and direction of management. On August 31, 1994, Edward Lee issued a memorandum to all employees stating that as of September 1, 1994 Steve Keenan would serve as executive vice-president in charge of Marketing and Sales.

22. After petitioner's resignation as treasurer, the two Bank of New York accounts previously identified were updated to require only Edward Lee's signature on corporate checks. These updates were signed by petitioner on September 7, 1994 as secretary of CashTek. From January 1994, petitioner was aware that CashTek was unable to meet its financial obligations and was not paying over withholding taxes to the State.

23. In a memo to Edward Lee, dated March 29, 1994, petitioner asked Lee to provide funds with which to pay some of CashTek's obligations. The memorandum requests Lee's authorization to write a check for the employees' medical insurance and states that he and Larry Schluger are willing to write such a check only if Lee could assure that funds would be in place to cover the check. Petitioner listed other pressing obligations of CashTek including: \$20,833.33 for rent; \$15,000.00 for an unidentified individual; \$40,043.39 for the IRS; and money for a COD that was turned away because of lack of funds. Lee replied in a fax from Taiwan with a promise to have the funds in place for rent, employee insurance and salaries. In a fax to Shepard Lane, CashTek's outside counsel, petitioner reported the contents of the Lee memorandum.

24. In a second memo to Edward Lee, dated May 4, 1994, petitioner stated:

Regarding the bank account at The China Trust Bank you opened while I was away. The Board authorized that any bank account must have two signatures. I suggest we amend the corporate resolution you submitted to that bank to reflect the appropriate required signatures or close the account. Please advise.

25. Both before and after tendering his resignation as treasurer of CashTek, petitioner wrote checks payable to the Department of Taxation and Finance; corresponded with the Division regarding CashTek's outstanding tax liabilities and executed Deferred Payment Agreements on behalf of CashTek. In a letter dated May 27, 1994, petitioner, as vice president, secretary and treasurer, acknowledged a telephone conversation about outstanding 1992 withholding tax liabilities of CashTek corporation, and he extended assurances to the Division that CashTek would pay \$1,267.62 per month until the outstanding liability was paid. Petitioner executed deferred payment agreements on June 3, 1994 and August 15, 1994. He signed corporate checks on October 17, 1994 and October 26, 1994.

26. CashTek's quarterly combined withholding and wage reporting returns (forms WT-4-A) for the assessment period were entered in evidence. Each return shows New York State tax withheld from gross wages, and no remittance to the State. The withholding tax owed by CashTek is based on the tax withheld per these returns. The quarterly returns for the period January 1992 through December 1992 are signed by Harold Lindo. The quarterly returns for the period January 1993 through June 1993 are signed by Jeffrey Lindo. The quarterly returns for the period July 1993 through September 1993 and October 1993 through December 1993 are signed by Edward Lee, and each is dated March 5, 1994. The quarterly returns for the period January 1994 through June 1994 are also signed by Edward Lee. There is no evidence that petitioner signed withholding tax returns, or any other tax returns, on behalf of CashTek.

27. A CashTek business plan published in September 1994 lists petitioner as one of four members of the CashTek "Management Team" describing him as "Vice President and Secretary of the Company with responsibilities in Marketing and Investor Relations since June 1988." The other members of the team are Edward Lee, described as CEO of the company, Stephen R. Keenan, executive vice president, and Paul Swers, "Vice-President of Product Development". The members of the board of directors are also identified in the business plan, but no one is identified as treasurer of the corporation. CashTek's articles of incorporation, by-laws and minutes were not introduced into evidence.

28. In November 1994, petitioner loaned CashTek \$30,000.00 with an interest rate on the loan of 10 percent per annum. At that time, he still held the titles of vice president and secretary of CashTek. In November 1994, petitioner was repaid \$15,000.00 and in January 1995 he was repaid the balance due him.

29. In its December 31, 1994 filing with the Securities and Exchange Commission, CashTek reported that it had issued 86,900 shares of preferred stock and 26,010,005 shares of common stock. Petitioner owned 20,000 shares of CashTek stock, less than one-tenth of one percent of the shares outstanding.

30. As CashTek was in a developmental stage, it had little revenue from sales of products. It attempted to bridge the gap in capital deficiencies through short term loans from Edward Lee, petitioner and certain foreign investors. In addition, certain legal proceedings instituted by CashTek held the promise of bringing funds into the company. The suit against the Lindos asked for damages of \$4 million plus punitive damages. In addition, CashTek sued the Totalizer Agency Board (the "TAB"), a board of the government of Australia, for alleged infringements on CashTek's copyrighted gaming technology. That suit was settled on December 23, 1994. By the terms of the settlement agreement, CashTek received \$1.5 million before expenses associated with the law suit. The settlement also confirmed the TAB's license to sell gaming terminals using CashTek's technology, subject to the payment of a royalty of \$300 per terminal. In addition, CashTek was engaged in settlement negotiations with the Kenilworth bankruptcy trustee over payments allegedly owed by CashTek to the Kenilworth estate.

31. In a letter to Edward Lee dated January 20, 1995, petitioner urged the use of the TAB settlement funds to satisfy outstanding tax liabilities. The letter states, in relevant part:

I am aware that we recently settled with the TAB and received \$1,200,000 which is a figure that is well in excess of any taxes which we owe.

I understand that, as an officer of CashTek, it is my fiduciary responsibility to do everything in my power to insure that all taxes are paid. Therefore, I am requesting you to pay all back taxes owed before paying off any loans. I am writing this letter to you in order to go on record that I have requested that you pay all back taxes in full or, if payment terms are arranged, that at all times you should have enough money to pay those taxes in full just in case the outlook to raise

additional funding becomes uncertain. You are completely in control of all operations and the CashTek funds and it is understood that I have absolutely no say as to how those funds are utilized. My signature on the CashTek Bank of New York Accounts, as well as Larry Schlugers', is only as a convenience to you and the way you operate. At no time do either of us have any say so or control outside your approval or verbal authorization.

This letter will serve to advise you that if you fail to pay any taxes which are owed to the taxing authorities, it will be understood that you have done so without my cooperation and against my insistence that you pay all taxes when due. If the taxing authorities come after me, under the assumption that I am a responsible person, I intend to use this letter to help prove that I am not a responsible person.

32. By letter to Edward Lee dated January 31, 1995, petitioner requested that he be removed as an authorized signatory on any CashTek bank accounts.

33. By letter to Edward Lee dated March 16, 1995, petitioner resigned as secretary and vice president of CashTek. He gives two reasons for his resignation: Lee's failure to satisfy back taxes and Lee's "lack of faith and support for CashTek."

34. In a letter to Edward Lee dated April 19, 1995, petitioner wrote to explain his reasons for terminating his relationship with CashTek. He explains that his last pay check was for the period ending March 8, 1995 and that he was laid off due to lack of funds to pay his salary as of April 6, 1995. Apparently, Lee expected petitioner to remain with CashTek as an uncompensated consultant, and petitioner refused to do so. Petitioner explained his position as follows:

The reason for my resignation was mainly due to your failure to pay the back taxes which has caused my personal life a great deal of harm. You had funds available to pay those taxes but elected to re-pay your investors instead. Now the taxing authorities are suggesting that I am personally responsible for those back taxes. You know very well that I had no control or say so as to how the funds are managed or spent for CashTek. You were the only party in control of CashTek funds and you continuously assured me that upon receipt of any financing of the TAB settlement that you would take care of the Taxing Authorities. As you know, I worked very hard and did everything in my power to help you with the

settlement. Why should I have to be held accountable for something that was not under my control?

35. In a letter dated July 28, 1995, with the salutation "To Whom It May Concern," Larry Shluger states that petitioner did not have any control over the financial decisions of CashTek. He states that petitioner was never an executive vice-president and that matters pertaining to taxes were supervised entirely by Edward Lee or former presidents or executive vice presidents of CashTek.

36. CashTek had an account with Safra National Bank (account number 42470210). The funds from the TAB settlement were deposited in this account, and Edward Lee was the sole signatory on that account.

37. Petitioner believes that \$1 million remains in the Kenilworth estate under the control of the bankruptcy trustee. It is his belief that this money is available to satisfy any outstanding tax obligations of CashTek.

38. Petitioner provided an analysis of deposits in the Bank of New York account for the period September 14, 1993 through December 31, 1994 which shows total deposits of \$2,659,834.00. This was offered as evidence that Edward Lee deposited into the Bank of New York account the bare minimum necessary to pay those items that Edward Lee decided should be paid.

39. CashTek filed a chapter 11 bankruptcy plan of reorganization on November 12, 1996, and an order confirming that plan was docketed in the United States Bankruptcy Court of the Southern District of New York on September 5, 1997. New York State filed a proof of claim asserting a priority claim of \$129,260.34 for taxes owed without penalties. The bankruptcy

court's order directs the payment of these taxes. Petitioner made a claim for unpaid wages in the bankruptcy proceeding.

40. The Division submitted 16 proposed findings of fact (the number 14 was omitted). Proposed findings of fact 1, 2, 3, 4, 6, 7, 8, 9, 10, 11,12,13,15 and 16 were substantially incorporated into this determination. Proposed finding of fact 17 was modified because it erroneously states that petitioner represented himself as a "salesman" for CashTek and contained an inference that CashTek's articles of incorporation and by-laws would have disproved this representation. Proposed finding of fact 5 was rejected as irrelevant.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

41. Petitioner claims that from January 1, 1992 through January 1994, the Lindos were in complete control of the corporation, including all of its financial affairs. Petitioner notes that he signed no tax returns on behalf of the corporation during this time, and signed checks only as a convenience for the Lindos and under their authority and control. He asserts that the board of directors appointed him to the position of temporary treasurer only in an attempt to stop the Lindos from dissipating the assets of the corporation, an attempt that proved futile. Petitioner notes that in his position as vice president his sole responsibilities were in the areas of marketing and investor relations. Furthermore, he contends that as vice-president and secretary he was not a person under a duty to collect, truthfully account for and pay over withholding taxes on behalf of CashTek.

42. Regarding the period during which he served as treasurer of CashTek, August 1993 through July 1994, petitioner contends that he had no authority over any employees and did not exercise control over the fiscal matters of the corporation. He claims that the fiscal affairs of the corporation were completely under the control of the president and executive vice-president of

the corporation, Edward Lee and Stephen R. Keenan. He notes that after Lee's appointment as president petitioner served as treasurer for only a few months and was then replaced by Lee himself.

43. Petitioner repeatedly pointed out that the funds necessary to satisfy CashTek's withholding tax obligations were available under both the Kenilworth bankruptcy plan and the CashTek bankruptcy plan. It is his contention that if he is found liable for the penalties asserted CashTek should be required to pay any taxes owed before he is made liable for any remainder.

44. The Division asserts that petitioner was a person under a duty to pay withholding taxes on behalf of CashTek. As evidence of this, the Division points out that (1) petitioner owned corporate stock; (2) earned a substantial income from the corporation; (3) had use of a company car; (4) was an authorized signatory on corporate checking accounts; (5) wrote corporate checks to satisfy tax obligations; (6) executed deferred payment agreements on behalf of the corporation; (7) loaned money to the corporation; (8) spoke to the media on the corporation's behalf; and (9) held various corporate offices during the assessment period. The Division asserts that petitioner has not provided credible evidence that he was not a person responsible for the collection and remittance of withholding taxes or that he was such a person but was precluded from acting.

45. The Division claims that petitioner knew employment taxes were not being paid yet failed to take any measures to satisfy his fiduciary responsibility to ensure their payment.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 685(g) imposes a penalty on certain persons who fail in their responsibility to collect and pay over income taxes:

Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax . . . shall, in addition to other penalties provided by law,

be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Section 685(n) of the Tax Law defines persons subject to the section 685(g) penalty as “an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.”

To determine whether an individual is a “person” pursuant to section 685(g), it is necessary to embark on a factual inquiry. Factors which should be considered are whether the petitioner signed the tax return in respect of which the liability arises, derived a substantial part of his income from the corporation, or had the right to hire and fire employees (*Matter of Malkin v. Tully*, 65 AD2d 228, 412 NYS2d 186; *see also, Matter of MacLean v. State Tax Commn.*, 69 AD2d 951, 415 NYS2d 492, 494, *affd* 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person’s official duties, the amount of stock he owned and his or her authority to pay corporate obligations (*Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272, 273; *see also, Matter of McHugh v. State Tax Commn.*, 70 AD2d 987, 417 NYS2d 799, 801).

In proceedings before the Division of Tax Appeals, the petitioner carries the burden of proof by clear and convincing evidence (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Tavalacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174; Tax Law § 689[e]).

B. Petitioner’s association with CashTek can be divided into two different periods: the period during which the Lindos were in control of the corporation, in terms of the relevant tax periods from January 1, 1992 through January 4, 1994, and the period following, from January 7,

1994 through June 24, 1994. I conclude that petitioner was not a person responsible for the collection and paying over of withholding taxes during the Lindo period but was such a person during the last two quarterly assessment periods.

C. During the Lindo regime, petitioner was a vice president and secretary of the corporation and had check signing authority. However, he signed no tax returns, did not represent himself as a principal of the corporation, had no responsibility for the financial affairs of the corporation, did not hire or fire employees and had no authority to pay corporate obligations. Although petitioner received substantial income from the corporation, it is apparent that his income was derived from services performed by him as an employee. Moreover, the amount of stock owned by petitioner was so small as to be totally insignificant. Petitioner's letter of resignation from his positions as vice president and secretary in July 1993 underscores his lack of authority. As he stated in that letter, his titles did not accurately reflect his status in the corporation. He credibly testified that he was given no information about the financial affairs of the corporation and did not have the ability to obtain such information during the Lindo regime.

Although petitioner accepted the title of treasurer in August 1993, there is no evidence that his status within the corporation changed while Jeffrey Lindo remained in charge. No changes were made to the corporate bank accounts, no tax returns were signed by petitioner and petitioner was unable to restrain Jeffrey Lindo's practice of allowing his father access to corporate checks. In fact, the complaint filed against the Lindos asserts that Jeffrey Lindo remained in the position of treasurer until January 1994. Petitioner remained a co-signatory on the corporate checking account, able to sign checks but without authority to pay corporate obligations or to stop Jeffrey Lindo from dissipating the assets of the corporation. Petitioner still had no access to books and records of the corporation and no ability to pay corporate obligations. Harold Lindo, Jeffrey

Lindo and Edward Lee signed the withholding tax returns which form the basis for the penalty assessment against petitioner. Weighing these facts against the relevant standard, I find that petitioner was not a person required to collect and pay over withholding tax for the period January 1, 1992 through December 24, 1993.

This conclusion is supported by the result reached by the court in *Matter of Amengual v. State Tax Commn. (supra)* where the petitioner was found not to be responsible for the collection of taxes because she owned no stock in the company, played no role in the normal procedures for payment of employees, could not hire or fire employees, did not receive substantial income from the corporation and had little authority over the affairs of the corporation. Although petitioner received substantial income from the corporation, he, like the petitioner in *Amengual*, had no actual authority over the corporation, and this factor warrants the same conclusion that was reached in *Amengual* (*see also, Matter of Gruenhagen*, Tax Appeals Tribunal, November 15, 1990 [where a corporate officer with signature authority over the checkbook, who signed checks, including payroll checks, and tax returns, was found not to be a responsible person because she “had an insignificant amount of actual authority over the [corporation]”]).

Citing to *Matter of Goodfriend* (Tax Appeals Tribunal, January 15, 1998), the Division argues that absent evidence other than petitioner’s testimony the Commissioner’s determination must stand. It then claims that there is no evidence other than petitioner’s own testimony to support his claim that he was not a responsible officer. This claim is rejected. The documentary evidence in the record supports and lends credibility to petitioner’s testimony that he had no authority over corporate affairs while the Lindos were in charge of CashTek. The SEC filings, the facts outlined in the complaint brought by CashTek against the Lindos and the tax returns

signed by the Lindos, lend weight to petitioner's testimony. Of the nine factors relied on by the Division to show that petitioner was a responsible person, only five are applicable to this period and two of these are totally insignificant--petitioner's minimal stock ownership and his use of the company car. Thus, the evidence in the record is sufficient to overcome the presumption of correctness that attaches to the Division's notices of deficiency.

D. Petitioner's authority within the corporation changed significantly after the ouster of Jeffrey Lindo. From that time, petitioner was the treasurer of CashTek, and in that position, he knew, or should have known, the details of the financial affairs of CashTek. Beginning early in January 1994, petitioner's name appears on corporate bank documents with a frequency that establishes the change in his status. He signed a financing agreement on behalf of CashTek, he was given access to the corporation's safe deposit box, and he corresponded with CashTek's attorney, Shepherd Lane. Petitioner was no longer one of three signatories on the corporate checking account; his was one of three signatures required to sign corporate checks. No corporate obligations could be paid without his signature. Petitioner was aware that other corporate obligations were paid while State withholding taxes were not paid. He executed deferred payment agreements on behalf of the corporation and signed checks payable to the Division, thus representing himself as one with authority to act on behalf of the corporation. This evidence shows that petitioner's status and authority within the corporation changed when Edward Lee became president. By accepting the position of treasurer and acting on behalf of CashTek in Edward Lee's absence, petitioner accepted responsibility for CashTek's tax obligations. Although petitioner testified that he had no authority to act without Edward Lee's direction, he, as corporate treasurer, had a responsibility to see to it that the corporation's withholding taxes were paid. That petitioner chose not to exercise his authority and allowed

Edward Lee to dictate the affairs of the corporation does not relieve him of liability (*see, Matter of Hopper v. Commr. of Taxation and Fin.*, 224 AD2d 733, 637 NYS2d 494, 495).

Petitioner's assertion that his failure to pay over the withholding taxes was not willful is not persuasive. Willfulness under Tax Law § 685(g) may be found when "the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes" (*Matter of Levin v. Gallman*, 42 NY2d 32, 34, 396 NYS2d 623). "[S]omething more than accidental nonpayment" is all that is required (*id.*, at 34, 396 NYS2d at 625). Petitioner did not demonstrate that he took any affirmative steps to ensure payment of taxes withheld during the assessment period. Petitioner introduced into evidence a memo from himself to Edward Lee asking Lee to deposit funds into the corporate checking account to pay for employee medical insurance. This was intended as evidence that petitioner had neither the authority nor the ability to pay corporate debts without Lee's permission. Petitioner also introduced summaries of bank statements to show that Lee deposited only a minimal amount of money into the corporation's bank account. None of this establishes that petitioner's conduct was not willful under section 685(g) since the evidence shows that petitioner had actual knowledge that withholding taxes were not paid when due (*see, Matter of Anzilotti*, Tax Appeals Tribunal, February 22, 1996). There is no evidence that petitioner took any steps to insure the payment of withholding taxes during the assessment period. In fact, it appears that petitioner at least acquiesced in the decision to defer payment of the withholding taxes. All of petitioner's requests that withholding taxes be paid were made after the assessment period and after petitioner had resigned as treasurer of the corporation. His pleas for payment of tax were made to avoid his own liability not to satisfy his personal responsibility to see that income taxes were withheld and paid over to the State.

E. Petitioner's argument that the Division should seek to collect the tax due from CashTek or the Kenilworth estate before asserting penalties against him is without merit. The liability imposed under Tax Law § 685(g) is neither derivative nor secondary to the employer's liability (*Matter of Yellin v. New York State Tax Commn.*, 81 AD2d 196, 440 NYS2d 382).

F. The petition of Mitchell G. Menik is granted to the extent indicated in Conclusion of Law "B"; the notices of deficiency issued to petitioner for the period January 1, 1992 through December 24, 1993 are cancelled; the notices of deficiency issued to petitioner for the period January 7, 1994 through June 24, 1994 are sustained; and in all other respects, the petition is denied.

DATED: Troy, New York  
June 25, 1998

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE